ARAB MALAYSIAN FINANCE BHD.

v.

ACCORD CREDIT & LEASING SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT KOD. D2-22-314-89]
21 SEPTEMBER 1990

BANKING: *Block discounting master agreement - Increasing additional facilities offered over the years - Discount rates - New block agreements executed each time - Fresh guarantee and indemnity - Failure to pay - No discount rate specified - Terms of letter of offer - Incorporated in master agreement - Whether duty to mitigate loss by enforcing other securities.*

CONTRACT: *Guarantee - Signed by directors of company - Non est factum - Past consideration.*

Under a block discounting master agreement dated 16 February 1983, the plaintiff agreed to purchase the 1st defendant's (D1) contractual rights in hire purchase agreements entered into by D1, as owner, with various hirers. This arrangement had been subsisting between the parties since 1981, and the plaintiff had offered the defendant increasing amounts of facilities, guaranteed by D1's 9 directors.

On 3 January 1983, the facility was increased to RM3 million. On 21 February 1984, the plaintiff offered another RM2 million but unlike previous occasions, no new block discounting agreement was executed by the parties, the plaintiff relying instead on the master agreement. A fresh block discounting guarantee and indemnity dated 3 April 1984 was executed by all of the defendant's director, the 2nd to 8th defendants. The plaintiff then sued D1 for monies due and owing, explaining that it was not necessary to execute a new block discounting master agreement as there was no change made to the discount rates applicable to the new additional facility offered.

The defendant disputed liability under the master agreement, arguing that since a new block master agreement was not executed, as had been the normal practice in the past, the plaintiff cannot base its cause of action on the 1983 master agreement. The plaintiff had obtained summary judgment under O. 14 Rules of the High Court 1980. This was the appeal by the 1st, 2nd, 3rd, 5th, 6th and 8th defendants.

Held:

[1] An examination of the letter of offer shows that in relation to the facility offered in 1984, the terms and conditions stated in the letter dated 1 March 1983 was applicable, whereby the discount rates for the additional facilities were specified. These discounting rates were incorporated in s. 1.06 (ii) in the master agreement. Therefore, the need for the execution of a new block discounting master agreement becomes superfluous as there had been no change in the discounting rates.

[2] The guarantee and indemnity dated 3 April 1984 and executed by the 2nd to 8th defendants was a continuing guarantee; the directors knew exactly what they were signing and cannot now plead *non est factum* or that the guarantee is bad on the ground of past consideration.

[3] Although the plaintiff has other securities that it can enforce, it is not obligated or duty bound to enforce such securities in priority to the master agreement and the guarantee. The plaintiff has suffered a financial loss and there is no question of it mitigating its losses as the plaintiff's cause of action stems principally from D1's default in failing to pay the monthly instalments, a breach of the master agreement.

[Defendants' appeals dismissed with costs.]

For the Defendants/appellants - C.C. Choo; M/s. C.C. Choo & Co.
For the 6th Defendant/Appellant - Chew Biman; M/s. Chew Biman & Co.
For the Plaintiff/Respondent - Benjamin Dawson; M/s. Nik Hussain & Partners

JUDGMENT

Siti Norma Yaakob J:

The plaintiff's cause of action against the 1st defendant is on a block discounting master agreement dated 16 February 1983, (the master agreement) wherein the plaintiff agreed to purchase the 1st defendant's contractual rights in hire purchase agreements entered into by the 1st defendant, as owners, with various hirers.

It is not disputed that this business arrangement had been subsisting between the parties since 1981, when pursuant to the plaintiff's letter of offer dated 23 December 1980, offering the 1st defendant block discounting facilities to the limit of RM500,000, the 1st defendant executed a hire purchase block discounting agreement (the first agreement) with the plaintiff on 17 February 1981, performance of which was guaranteed by the 9 named directors of the 1st defendant pursuant to a joint and several guarantee (the first guarantee) also executed on 17 February 1981.

Then on 11 March 1982, the plaintiff offered the 1st defendant an additional facility of RM500,000 thereby increasing the existing aggregate total of all block discounted to the 1st defendant to not more than RM1 million, which offer was accepted by the 1st defendant as evidenced by a second block discounting agreement (the second agreement) executed by the plaintiff with the 1st defendant on 28 June 1982, performance of which was again guaranteed by the 1st defendant's same 9 directors pursuant to another guarantee dated 28 June 1982 (the second guarantee).

On 3 January 1983, the plaintiff again offered the 1st defendant another additional facility of RM2 million, thereby increasing the existing facility to not exceeding RM3 million, which offer was again accepted by the 1st defendant by the execution of the master agreement, this being the third of its kind, performance of which was again guaranteed by the 1st defendant's same 9 directors pursuant to a block discounting guarantee and indemnity dated 18 February 1983 (the third guarantee).

Then on 21 February 1984, the plaintiff made another offer of an additional RM2 million facility to the 1st defendant, thereby increasing the existing facility to not more than RM5 million, which offer was readily accepted by the 1st defendant, but this time no new block discounting agreement was executed by the parties, the plaintiff relying instead on the master agreement on which its cause of action against the 1st defendant is founded. However, a fresh block discounting guarantee and indemnity dated 3 April 1984 (the guarantee) was executed by all 7 of the 1st defendant's directors, the 2nd - 8th defendants in this suit. The same 7 directors together with 2 other directors who had since resigned had also executed the first, second and third guarantees.

In disputing liability under the master agreement, the 1st defendant contends that when the plaintiff's last letter of offer dated 21 February 1984 was accepted, and following the practice adopted since 1981, the additional facility offered must be properly documented by the execution of a new block discounting master agreement. Since this was not done, the 1st defendant contends that the plaintiff cannot resort to the master agreement to establish the 1st defendant's liability from the sum due and outstanding resulting from the 1st defendant's default in failing to comply with the terms and conditions of the master agreement particularly in failing to repay the collection value by way of monthly instalments on their due rates.

The plaintiff has explained that there was no necessity to execute a new block discounting master agreement when the last offer to increase the limit of the facility to RM5 million was made as there was no change made to the discount rates applicable to the new additional facility offered. This is confirmed by the sentence appearing at p. 2 of the letter of offer which reads as follows:

> All other terms and conditions as stated in our (that is, the plaintiff's) letter of offer dated 3 January 1983 shall apply to this additional facility.

Paragraph 3 of the plaintiff's letter of offer dated 3 January 1983, specifies the discount rate applicable to the additional facility of RM2 million offered by the letter and this discount rate was also the rate to be made applicable for the additional facility of RM3 million offered by the letter of offer dated 21 February 1984.

The soundness of this explanation can be seen if one traces the discounting rate offered by each letter of offer.

In the plaintiff's first letter of offer dated 23 February 1980, the discount rate was calculated at 8.68% per annum discounted at source on the collection value over the average life of the hire purchase agreements. This term is incorporated as s. 1.05 in the first agreement.

In the plaintiff's second letter of offer dated 11 March 1982, para. 3 sets out the discount rate applicable for the additional RM500,000 facility offered and this rate is totally different to that offered in the first letter of offer dated 23 December 1980. There was therefore a need to have a new block discounting agreement executed to incorporate the new discounting prescribed rates, hence the second agreement came into being with provisions in s. 1.06(ii) incorporating the new discounting rates.

Likewise in the plaintiff's third letter of offer dated 3 January 1983, the discount rate specified in para. 3 of the letter varies with the discount rates provided in the second agreement, hence the need to execute the third agreement incorporating the new discounting rates in s. 1.06(ii).

However, the plaintiff's last letter of offer dated 21 February 1984 makes no provision of a different discounting rate for the increased facility. On the contrary, it confirms that the discounting rates applicable shall be the discounting rates set out in its third letter of offer dated 3 January 1983, which have already been incorporated in s. 1.06(ii) in the master agreement. Section 1.01 of the master agreement too, does not specify the amount of limit that the plaintiff is prepared to offer the 1st defendant, on the contrary it allows the plaintiff to consider purchasing the 1st defendant's contractual rights from time to time, thereby envisaging an intention that the plaintiff would increase the existing facility from time to time. Under such circumstances, the need for the execution of a new block discounting master agreement becomes unnecessary and superfluous as there had been no change in the discounting rates, an important feature in transactions of this nature.

The guarantee and indemnity executed by the 2nd - 8th defendants in this suit dated 3 April 1984 is a continuing guarantee as expressed in Clause 1 of the guarantee. All the 7 signatories are directors of the 1st defendant and they had, on 28 February 1984, passed a resolution accepting the plaintiff's offer of an additional RM2 million discounting facility thereby increasing the limit to RM5 million. So when they signed the guarantee, they knew exactly what they were signing for and they cannot now, five years later, plead *non est factum* or that the guarantee is bad on the ground of past consideration.

Reference was also made to the earlier guarantee and indemnity dated 18 February 1983, which the guarantors maintain should be enforced and not the later one dated 3 April 1984. Nine signatories executed the earlier guarantee and they were then the current directors of the 1st defendant. However, following the resignations of 2 of them, the 1st defendant had, by letter dated 23 December 1983, informed the plaintiff of this fact and sought the plaintiff's consent to withdraw the 2 directors as guarantors for the additional block discounting facility. It was following this request that the remaining 7 directors executed the guarantee dated 3 April 1984, which for all intents and purposes was to substitute the earlier guarantee. Under such circumstances, there is only one guarantee that the plaintiff can enforce, the one dated 3 April 1984.

The plaintiff has also claimed interest at the rate of 0.044% per day, which the defendants maintain run contrary to the rate specified in the letter of offer dated 21 February 1984. Since the rate at 0.66% per day specified in the letter of offer is higher than what is being claimed by the plaintiff, I do not see any merit to the defendants' objection, neither can the interest be regarded as a penalty as what the plaintiff is charging is what the parties had agreed to be bound in the event of default.

Under s. 3.04 of the master agreement, the plaintiff has been granted a power of attorney for the purpose of "demanding, suing or recovering and giving effectual discharges for all sums payable by any hirer or lessee under the hire agreement and for the recovery of any goods, the subject matter of any agreement or for damages for their detention".

By reason of this clause, the 1st defendant has assigned all its rights in the hire purchase agreements together with any securities taken by the 1st defendant in connection with the hire purchase agreements, to the plaintiff. By virtue of this, the defendants maintain that the plaintiff should mitigate its losses by enforcing the securities that had been assigned to it before proceeding to enforce the master agreement and guarantee.

Whilst it is true that the plaintiff has other securities it can enforce, it is not obligated or duty bound to enforce such securities in priority to the master agreement and guarantee. The plaintiff has suffered a financial loss and there is no question of it mitigating its losses as the plaintiff's cause of action stems principally from the 1st defendant's default in failing to repay the collection value by monthly instalments on the due dates, a breach of s. 2.02 of the master agreement and for which the 1st defendant has unequivocally admitted in its letter dated 8 July 1988 addressed to the plaintiff.

As the proceedings before me were in the nature of appeals filed jointly by the 1st, 2nd, 3rd, 5th and 8th defendants, and individually by the 6 defendant, against an O. 14 judgment entered against them, and since no triable issue has been raised that merits this case proceeding to trial, I had accordingly dismissed the defendants' 2 appeals with costs.

Also found at [1991] 3 CLJ 1755